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International Convention for the Protection of All Persons from Enforced Disappearance

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Committee on Enforced Disappearances
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Item 6 of the provisional agenda
Consideration of reports of States parties to the Convention

List of issues in relation to the report submitted by Senegal under article 29 (1) of the Convention

Addendum

Replies of Senegal to the list of issues*

[Date received: 14 February 2017]

I. General information

Reply to paragraph 1 of the list of issues

1. Senegal will submit this matter to its authorities. Due attention will be paid to the question of recognizing the competence of the Committee to receive and consider individual and inter-State communications as part of the country's legislative reform process.

Reply to paragraph 2 of the list of issues

2. In order to strengthen the Senegalese Human Rights Committee, the State provided it with new, modern premises some four years ago at its own expense. It also increased the Committee's budget from 36 million to 80 million, enabling it to recruit more staff to strengthen its human resources.

3. However, the Act establishing the national human rights commission, which is seen as further strengthening the Senegalese Human Rights Committee and bringing it into full conformity with the Paris Principles, has not yet been adopted, but will be in the near future.

4. The Senegalese Human Rights Committee has a general mandate to promote and protect human rights. It is therefore competent to investigate cases of enforced disappearance, as is also the National Observatory of Places of Deprivation of Liberty, which is obliged to report to the authorities whatever cases of enforced disappearance it may have observed in the course of its visits.

* The present document is being issued without formal editing.

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5. The budget of the National Observatory of Places of Deprivation of Liberty has increased significantly in the years since its establishment in 2012.

6. In order to guarantee the total independence of the national mechanism for the prevention of torture from the executive branch, Senegal, through the Act establishing the National Observatory of Places of Deprivation of Liberty, has taken the following steps:

- Budgetary autonomy: according to article 12 of Decree No. 2011-842 of 16 June 2011, which gives effect to the provisions of Act No. 2009-13 of 2 March 2009 establishing the National Observatory of Places of Deprivation of Liberty, "the resources allocated to the National Observatory of Places of Deprivation of Liberty, which are provided for under the Finance Act, and the subsidies provided by local authorities or any other natural or legal person, are paid into the call deposit account opened in the books of the public treasury".
- A non-renewable mandate of five years: the National Observatory may not be relieved of its functions prior to the expiration of its mandate except in the event of resignation or incapacity (art. 2 (2) of the Act). It enjoys immunities and privileges during its mandate.
- Independence from State authorities: the Observatory does not receive instructions from any authority in respect of matters falling within its remit (art. 6 of the Act).
- Authorization to recruit observers and administrative staff (art. 3 of the Act).

7. As to the relationship between the Senegalese Human Rights Committee and the National Advisory Council, it should be noted that their mandates are not the same.

8. The Senegalese Human Rights Committee serves as the country's national human rights institution, governed by the Paris Principles, whereas the National Advisory Council is a State entity responsible for coordinating the preparation of the country's periodic reports and ensuring that the recommendations and decisions of regional and international treaty bodies are followed up. It also advises and makes proposals to the Government on matters of human rights, international humanitarian law and humanitarian action.

9. The Senegalese Human Rights Committee also issues opinions to the Ministry of Justice and relevant ministers on all matters relating to the defence, protection and promotion of human rights and the guarantee of their full enjoyment.

10. The National Advisory Council comprises representatives of the Office of the Prime Minister and all ministries of Senegal, as well as eight civil society organizations.

II. Definition and criminalization of enforced disappearance (arts. 1-7)

Reply to paragraph 3 of the list of issues

11. For the last 10 years, Senegal has been engaged in the process of reforming its Criminal Code and Code of Criminal Procedure with a view to bringing its domestic criminal law into line with the treaties that Senegal has ratified and punishing reprehensible acts not already covered in the current legislation. The Reform Commission has now concluded its work. The two reform bills, which are largely similar in technical terms, will be submitted to the authorities for adoption in the course of 2017.

12. The new Criminal Code, shortly to be approved, contains a section III entitled "Enforced disappearances". Article 153 of the new Criminal Code provides that: "Enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law. Any person who orders, solicits or induces or participates in the commission of an enforced

disappearance is liable to a term of imprisonment or criminal detention of between 10 and 20 years. The same penalties shall apply to a superior who:

- Knew that subordinates under his or her authority and effective control were committing or attempting to commit a crime of enforced disappearance;
- Consciously disregarded information which clearly indicated that fact;
- Exercised responsibility for and effective control over activities which were concerned with the crime of enforced disappearance;
- Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;
- No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance".

13. Senegal takes note that it needs to make reference to article 7 of the Convention in its bill by including the aggravating and mitigating circumstances provided for therein.

14. Paragraph 97 of the report of Senegal contains an error and is superfluous, as the responsibility of superior officials is in fact covered by the new article 153 on the criminalization of the crime of enforced disappearance.

Reply to paragraph 4 of the list of issues

15. The reform bill will provide that there may be no derogation from the prohibition of enforced disappearance. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

16. The constitutional and legislative framework for the exercise of rights and freedoms in Senegal is rooted in the faithful translation of the principles and rules set forth in international human rights conventions, including the International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966 and ratified in 1978. Moreover, article 98 of the Constitution stipulates that: "treaties or agreements duly ratified or approved shall, upon publication, take precedence over other laws, subject to their application, in the case of each agreement or treaty, by the other party". Through this key provision, the Constitution enshrines the supremacy of treaties in the domestic legal system and consequently reflects the country's commitment to human rights.

17. However, as in other countries, restrictions on the exercise of civil liberties are expressly provided for by law for the protection of national security and public order, health and morals.

18. For example, limits may be placed on freedom of expression to ensure respect for the rights and reputation of others. In any case, however, all restrictions are subject to independent assessment by the judiciary and any abuse of power on the part of the administrative authorities is punishable by the Supreme Court, which serves as an administrative judge.

19. Persons deprived of their liberty enjoy all legal safeguards for their defence.

20. Habeas corpus, the rule of law principle that guarantees that a person who has been arrested must be brought promptly before a judge who will rule on the validity of his or her arrest, is applied in Senegal. Articles 7 and 9 of the Constitution guarantee the security and freedom of the human person, and enshrine the principle of the legality of offences. Any infringement of freedoms or intentional restrictions on the exercise of a particular freedom are thus punishable by law. Defence is also an absolute right at all stages and levels of proceedings.

21. In accordance with these principles, any restriction of the exercise of a given freedom may be ordered only by an authority empowered to do so by law. The Code of Criminal Procedure lays down strict requirements concerning custody instituted by a

criminal investigation officer, which must be monitored by the public prosecutor. Detention falls within the jurisdiction of the judge.

22. Pursuant to the combined provisions of articles 55 et seq. of the Code of Criminal Procedure, if there is sufficient reliable and consistent evidence to justify pressing charges, the criminal investigation officer must bring the person concerned before the public prosecutor or his or her representative within 48 hours. The criminal investigation officer must also explain to the person concerned why he or she has been placed in custody (art. 55).

23. The public prosecutor or his or her representative, may, if he or she deems it necessary, or must, if requested by the person in custody or his or her counsel, arrange for the person to be examined by a doctor chosen by the latter (art. 56).

24. The record of the hearing of any person held in custody must also indicate the date and time when the person was first placed in custody, the reasons for the custody, the duration of any questioning, the duration of rest periods, as well as the date and time when the person was either released or brought before the competent judge (art. 57).

25. In practice, law enforcement authorities must remind persons deprived of liberty of these safeguards at all stages of the proceedings. Any failure to do so will be subject to disciplinary and criminal penalties. However, illiteracy and poverty may affect the effective exercise of such rights.

26. In order to strengthen the legal safeguards for the protection of liberty, Senegal has prepared two bills intended to reform the Criminal Code and the Code of Criminal Procedure, which, in addition to other measures aimed at protecting the rights of persons deprived of their liberty, provide for the presence of a lawyer during the first 24 hours of custody (moreover, in anticipation of the adoption of the reforms in their totality, on 28 October 2016 the National Assembly approved a bill amending Act No. 65-61 of 21 July 1965, which establishes the Code of Criminal Procedure, by making provision for the presence of a lawyer from the time of the person's arrest); the total prohibition or regulation of the practice known as *retour de parquet*; the removal of the power of the investigating judge of the trial court to issue a detention or arrest warrant; the introduction of a modified procedure for the issuing of summonses with a statement of charges by criminal investigation officers; and the obligation for the prosecutor to arraign the person apprehended in flagrante delicto within a specific time, failing which the detention warrant expires.

27. The reform passed on 28 October 2016 repeals old articles 8 (2) and 55 of Act No. 65-61 of 21 July 1965 establishing the Code of Criminal Procedure and replaces them with the following provisions:

> Article 55: "If, for the purposes of the inquiry, the criminal investigation officer is obliged to detain one or more of the persons referred to in articles 53 and 54, the duration of custody shall not exceed 24 hours.
>
> If there is sufficient reliable and consistent evidence to justify pressing charges, the criminal investigation officer must bring the person before the public prosecutor or his or her representative and may not detain the person for more than 48 hours. In the event of practical difficulties affecting the person's transfer, the public prosecutor must be notified immediately of the situation and delay.
>
> In both cases, the criminal investigation officer must immediately inform the public prosecutor, his or her representative or, failing that, the presiding judge of the trial court vested with the powers of the public prosecutor of his or her decision and explain to the person in question why he or she has been placed in custody.
>
> When the person in custody is a minor between the ages of 13 and 18 years, the criminal investigation officer must hold the minor in special quarters separate from adult prisoners.
>
> Persons held in police custody are under the effective control of the public prosecutor, his or her representative or, failing that, the presiding judge of the trial court vested with the powers of the public prosecutor.

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In all places where persons are held in custody, criminal investigation officers are required to keep a custody record, which is to be numbered and initialled by the public prosecutor, who must appear before any magistrate responsible for monitoring persons in police custody whenever he or she is summoned.

The time limit established in paragraph 2 may be extended for a further 48 hours with the written consent of the public prosecutor, his or her representative or the investigating judge.

The time limits established in the present article may be doubled in the case of crimes committed against national security, as well as crimes committed during a state of siege, a state of emergency or under the conditions set out in article 52 of the Constitution, with the proviso that the two grounds for doubling the time limit are not cumulative.

If police custody is extended, the criminal investigation officer is required to inform the person in custody of the reasons for the extension and of the provisions of article 56 of the present Code.

The criminal investigation officer is also required to inform the person at the outset of custody of his or her right to appoint a lawyer from among those on the roster or performing internships. Mention of these formalities shall be made in the custody record on pain of nullity. Lawyers shall assist their clients from the time of their arrest, during the preliminary investigation at the police or gendarmerie station, or before the prosecutor.

At this stage, no letter of appointment may be requested from the lawyer.

The appointed lawyer may be contacted by the person in custody or any other person designated by him or her or, failing that, by the criminal investigation officer. The lawyer may engage in fully confidential communication with the detainee by telephone or any other means, if he or she cannot visit the detainee in person within a reasonable period of time.

If the appointed lawyer cannot be contacted, the criminal investigation officer is required to make mention of this fact in the custody records.

The criminal investigation officer or an officer under his or her command must inform the lawyer of the nature of the charges.

Following the interview, the lawyer may present written observations that shall be appended to the case file.

The lawyer may not disclose the details of the interview to anyone while the person remains in custody.

The criminal investigation officer is required to inform the public prosecutor of the steps taken to give effect to the present article without delay".

28. For example, the new articles 66 and 67 of the bill reforming the Code of Criminal Procedure strengthen the guarantees underpinning individual freedoms.

Article 66: "The criminal investigation officer shall make mention in the custody records of any information or requests submitted under the present article, as well as the follow-up given thereto.

Such annotations must be signed by the person concerned; refusals to sign shall also be recorded.

The aforementioned information shall be included in the custody records on pain of nullity".

Article 67: "If the public prosecutor or his or her representative deems it necessary, arrangements can be made for the person in custody to be examined by a designated doctor at any time during the period of custody.

The person in custody, through the criminal investigation officer, his or her lawyer or any other person, may request the public prosecutor to arrange for such a medical

examination at any time. On receiving such a request, the public prosecutor must order the requested medical examination.

This examination shall be conducted at the location where the person in question is being held in custody and, if not requested ex officio by the public prosecutor, at the prior expense of the requesting party. In the latter case, mention must be made of the deposit made at the time the doctor is appointed".

Reply to paragraph 5 of the list of issues

29. The abduction of 12 mine-clearing experts by armed groups in July 2015 in the region of Sédhiou was resolved through goodwill.

30. It goes without saying that if similar actions were brought to the attention of the authorities, the necessary investigations and prosecutions would be carried out to bring those responsible to justice.

Reply to paragraph 6 of the list of issues

31. Article 5 of the Convention provides that: "The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law".

32. Article 431-2 of the Senegalese Criminal Code, on the other hand, provides, inter alia, that "enslavement or the massive and systematic practice of summary executions or the abduction of persons and their enforced disappearance" constitute a crime against humanity.

33. It is clear that article 431-2 (6) of the Criminal Code contains the elements of the crime of enforced disappearance that constitute a crime against humanity, in accordance with the applicable rules of international law, and article 5 of the Convention in particular.

Reply to paragraph 7 of the list of issues

34. In accordance with article 6 of the Convention, Senegalese criminal law, under the reform bill, shall hold criminally responsible any person who commits, orders or solicits or induces the commission of an enforced disappearance. This is clearly indicated on page 7 of the country's report.

35. Article 106 of the Criminal Code currently deals with these reprehensible acts.

36. According to article 6 (2) of the Convention: "No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance". This article appears to be in contradiction with article 106 of the Criminal Code on offences against liberty, which exempts from punishment subordinates who obey the instructions of their superior. Due account will be taken of this contradiction, so that the above article will need to be amended to cover the specific case mentioned in article 6 (2) of the Convention.

III. Judicial procedure and cooperation in criminal matters (arts. 8-15)

Reply to paragraph 8 of the list of issues

37. In particular, the public prosecutor must ensure that there is no room for interpretation that may have a negative effect on the recognition of the continuous nature of enforced disappearance.

38. As is the case for all offences, while a statute of limitations may be indicated, the continuous nature of the crime is sufficient reason for suspending or interrupting the period of limitation. Civil and administrative actions are generally closed after 10 or sometimes even 5 years, and it is important to ascertain whether such actions were brought at the same time as any criminal action.

Reply to paragraph 9 of the list of issues

39. There are plans to adopt a similar specific provision for all other cases of enforced disappearance, in conformity with article 11 of the Convention.

40. Article 669 of the Code of Criminal Procedure established under Act No. 2007-5 of 12 February 2007 provides that: "Any foreigner who outside Senegalese territory has been accused of committing or aiding in the commission of any of the crimes mentioned in articles 431-1 to 431-5 of the Criminal Code [crimes under the Rome Statute], or a crime or an offence that endangers the security of the State, or who engages in counterfeiting the State seal or national currency or any of the acts mentioned in articles 279-1 to 279-3 or 295-1 of the Criminal Code may be prosecuted and tried under Senegalese law or laws applicable in Senegal if he or she is arrested in Senegal or if one of the victims resides in the territory of Senegal, or if the Government secures the alleged offender's extradition".

41. This law incorporates the principles of universal jurisdiction and the non-applicability of statutory limitations to crimes under the Rome Statute in the national body of law. It also introduces the principle of personality, according to which Senegalese courts are competent to try cases in which the alleged perpetrator (active personality) or the victim (passive personality) of a crime under the Rome Statute or an act of torture is a Senegalese citizen.

42. However, article 669 does not specifically deal with the crime of enforced disappearance if it does not constitute a crime against humanity. Consequently, article 669 will need to be reviewed once enforced disappearance has been criminalized as part of the reform process.

43. The bill amending the Code of Criminal Procedure includes a new article 715, worded as follows: "Any citizen of Senegal who falls victim to a crime or an offence outside Senegalese territory may appeal to the Senegalese courts if the acts have not led to a definitive judgment".

44. This new provision will enable the Senegalese courts to conduct investigations if a Senegalese citizen becomes a victim of enforced disappearance abroad.

Reply to paragraph 10 of the list of issues

45. The procedure for dealing with allegations of enforced disappearance is the same as for other crimes and offences. The public prosecutor is competent to deal with any criminal offence.

46. The armed forces, as indicated in the report, have mechanisms for investigating offences committed by military personnel.

Reply to paragraph 11 of the list of issues

47. Senegalese domestic law safeguards the physical integrity of persons, regardless of whether they are victims of enforced disappearance or any other offence.

48. Under Senegalese domestic law, any public servant involved in an offence, including a member of the security forces, will be suspended before being brought before the disciplinary board. This is a precautionary measure applicable in all disciplinary proceedings.

Reply to paragraph 12 of the list of issues

49. Article 4 of Act No. 71-77 of 28 December 1971 on extradition provides that: "Acts which may give rise to extradition include all acts punishable by criminal penalties under the law of the requesting State, acts punishable by lesser criminal penalties when the maximum penalty imposed amounts to imprisonment for two years or more ...".

50. Once enforced disappearance has been criminalized in Senegalese legislation, the crime shall fall within the scope of the cases mentioned in article 4 of Act No. 71-77 of 28 December 1971. There is therefore no need to amend this law to include the crime of enforced disappearance as an extraditable offence in treaties concluded with other States.

51. This is in accordance with article 13 (2) of the Convention, which provides that "the offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States parties before the entry into force of this Convention".

52. Similarly, article 13 (4) and (5) of the Convention provide that: "If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between themselves".

53. Once the crime of enforced disappearance has been criminalized, the Indictment Division competent to deal with extradition matters will certainly ensure that enforced disappearance is never considered, for the purpose of extradition, to be a political or politically motivated offence. The Indictment Division in question shall take the Convention as the legal basis for extradition in the absence of any extradition treaty.

IV. Measures to prevent enforced disappearances (arts. 16-23)

Reply to paragraph 13 of the list of issues

54. An expulsion or refoulement decision may be appealed before the Supreme Court. In Senegal, it is expressly prohibited to extradite a person where there are substantial grounds for believing that he or she may face the death penalty or be subjected to acts of torture.

55. Once enforced disappearance has been criminalized, this prohibition shall be incorporated explicitly.

Reply to paragraph 14 of the list of issues

56. The mandate of the National Observatory of Places of Deprivation of Liberty also extends to ancillary army premises.

57. NGOs may obtain the authorization to visit places of deprivation of liberty.

58. Likewise, consular authorities may visit places of deprivation of liberty if nationals of their country are involved in criminal proceedings.

Reply to paragraph 15 of the list of issues

59. The reform passed on 28 October 2016 provides for the presence of a lawyer from the outset of custody. However, the duration of police custody must be limited to 48 hours and may be extended only subject to authorization from the public prosecutor.

60. Custody records must be numbered and initialled by the public prosecutor, who checks them regularly. These records contain most of the information mentioned in article 17 of the Convention.

61. The Government is not aware of any complaints concerning the failure by public officials to record an instance of deprivation of liberty.

Reply to paragraph 16 of the list of issues

62. Practically all the information mentioned in article 17 (3) of the Convention is included in the official detention records, irrespective of the nature and location of the place of detention. The Government knows of no cases of poor record-keeping.

Reply to paragraph 17 of the list of issues

63. Practically all the information mentioned in article 17 (3) of the Convention is included in the official detention records, irrespective of the nature and location of the place of detention. The Government knows of no cases of poor record-keeping.

Reply to paragraph 18 of the list of issues

64. Preparations for the bill on the establishment of a genetic fingerprint bank are on track and the bill is most likely to be approved.

Reply to paragraph 19 of the list of issues

65. Military and civilian law enforcement personnel receive training on human rights. The Government takes due note of the provisions of article 23 of the Convention and, once enforced disappearance has been criminalized, it intends to ensure that such training is provided.

V. Measures for reparation and protection of children against enforced disappearance (arts. 24 and 25)

Reply to paragraph 20 of the list of issues

66. Article 2 of the Code of Criminal Procedure provides that: "A criminal indemnity action for damages caused by any offence may be brought by anyone who has personally suffered loss or injury caused directly by the offence".

67. Article 3 of the Code provides that: "This action shall be admissible for all types of loss or injury, both material and physical or mental, resulting from the offences forming the subject of the proceedings". The injured party may institute proceedings before a criminal court to obtain compensation for loss or injury resulting from the offence forming the subject of the proceedings or for any other loss or injury for which the offender is directly responsible".

68. The concept of victim in Senegalese law is consistent with the definition set out in article 24 of the Convention.

Reply to paragraph 21 of the list of issues

69. Senegal is waiting for enforced disappearance to be criminalized in its domestic law before considering whether there is a need to establish a special fund for assisting victims.

70. For the time being, even in the absence of formal criminalization, the offence of enforced disappearance may be prosecuted under other offences and criminal proceedings may be instituted with a view to obtaining compensation or redress, be it from the State or from any other party held responsible.

Reply to paragraph 22 of the list of issues

71. Regardless of whether the person concerned has been declared missing or dead, the State must continue the investigation until such time as the fate of the disappeared person has been ascertained.

Reply to paragraph 23 of the list of issues

72. The Government takes due note of the suggestion to incorporate into the country's domestic legislation measures to facilitate the search for and identification of disappeared children and their return to their families. In any event, the prosecuting authorities are obliged to search for any disappeared child once they have been notified of the fact.

73. The annulment of an adoption or placement that originated as a result of an enforced disappearance is automatically granted by the courts in accordance with the general principle of law whereby "fraud vitiates everything".